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No. 96-320

IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,
Petitioner,

v.

MICHAEL BUCKLEY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* OWENS-ILLINOIS, INC. IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Owens-Illinois, Inc. ("Owens-Illinois") seeks to assist the Court in its analysis of the medical and scientific issues that serve as the purported foundation for the right of recovery announced by the Second Circuit in this case. Owens-Illinois has substantial experience with those medical and scientific issues. Respondent's medical expert witnesses often testify against Owens-Illinois in trials of asbestos-related personal injury cases. Owens-Illinois also was one of the prevailing parties in *Simmons v. Pacor, Inc.*, 674 A.2d 232 (Pa. 1996), in which the Pennsylvania Supreme Court held that the mere presence of a physical sign or "marker" of exposure to asbestos that is detectable by x-ray, but causes no impairment, does not

constitute a compensable tort injury. Owens-Illinois' experience with the medical and scientific issues in this case may be helpful to the Court because the Court has only one-half of a trial record before it. This matter was decided on directed verdict at the close of Respondent's proof and therefore contains a truncated record.

Owens-Illinois manufactured asbestos-containing thermal insulation products for a limited period of time ending in early 1958. More than two decades after it ceased manufacturing and selling such products, Owens-Illinois began receiving literally tens of thousands of personal injury claims arising from alleged exposure to the asbestos contained in those products. To date, Owens-Illinois has resolved more than two hundred thousand such claims. It nonetheless remains a defendant in more than fifteen thousand asbestos-related personal injury cases.

One reason Owens-Illinois continues to be plagued by thousands of asbestos-related claims almost four decades after it last sold the product giving rise to those claims is the wave of new filings by individuals who have x-ray changes consistent with asbestos exposure, but who suffer no current impairment of any kind. These non-impairment claims represent a serious challenge to the ability of the courts of this country to manage asbestos-related litigation. In many jurisdictions, however, affirmative steps have been taken to ensure that such claims are dismissed or placed on administrative dockets so that judicial and party resources are directed toward the claims of individuals alleging actual impairment or death due to asbestos-related diseases.

The decision of the Second Circuit in this matter threatens to create a new category of claims by permitting suit by individuals who are not presently impaired and have *no* detectable physical signs of asbestos-related disease. There is virtually no limit to the number of "exposure only" plaintiffs who would have causes of

action were the decision of the Second Circuit to become the law of the land. The existing asbestos docket control problems confronting the judiciary would pale in comparison to the problems created by this decision.

SUMMARY OF ARGUMENT

I. This case puts squarely before the Court the question whether people who are not sick may nonetheless recover tort damages simply because they were occupationally exposed to a potentially harmful substance—in this case, asbestos.

The problem of functionally unimpaired people filing lawsuits is not new to the asbestos litigation. Until now, however, such claims have generally been limited to plaintiffs who have suffered a clinically detectable physical change caused by asbestos exposure. Most courts that have confronted the issue have held that asymptomatic plaintiffs have not suffered a compensable tort injury and have found that such claims should be dismissed or placed on an inactive docket. For example, the transferee district judge in the federal multidistrict asbestos litigation (Judge Charles Weiner in the Eastern District of Pennsylvania) has "administratively dismissed" more than 18,000 maritime asbestos cases where the plaintiffs were not impaired. (Indeed, Judge Weiner has overseen the resolution of more than 40,000 asbestos cases.) *In re Asbestos Prod. Liab. Litig.*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). The courts have held that physical impairment is the hallmark of compensable tort injury and that the limited resources of the judiciary and parties involved in this mass tort problem should be directed at those claims that involve actual impairment or death.

II. The Respondent, Mr. Buckley, presents the most extreme form of non-impairment claim, for he admittedly has no clinically detectable changes whatsoever from his alleged asbestos exposure. His is an "exposure only"

claim. His "injury" is limited to theoretical health risks and the fears spawned thereby.

Mere exposure to a substance that may cause harm decades later has never been thought sufficient to support a tort claim, and for good reason. There is no tangible, discernible injury to moor the proceedings. The plaintiff does not even suggest that it is more probable than not that he will someday become functionally impaired, so the trial devolves into a debate about what is theoretically possible.

The judicial system is required to guess which of the "exposure only" plaintiffs that come before it will be the one in twenty (or one hundred, or ten thousand) who will someday realize the injury the risk of which all purportedly share—a guess that will, by definition, often turn out to be wrong. The alternative is to pretend that all plaintiffs will suffer the threatened fate, a decision that will overcompensate all but a tiny statistical minority. All the while, thousands of truly impaired plaintiffs will be required to wait their turn in the litigation queue.

III. The trial court record in this case is a testament to the futility of litigating risk-as-injury. No one knows what level of asbestos exposure Mr. Buckley actually had (no breathing zone measurements were conducted during his alleged exposure), so his experts made "estimates" based upon dubious extrapolations from different workers in different trades in different workplaces at different times. Even those experts, however, admit that Mr. Buckley's exposure is unlikely to lead to any asbestos-related disease.

The rule articulated by the Second Circuit—that people with "massive" exposure to a potentially harmful substance have suffered compensable tort injury even in the absence of physical impairment—is unlimited in scope, unsupported by the trial court record and virtually unprecedented. The better rule of law, and the rule this Court should reaffirm, is that the tort law has limits; that the

judicial system cannot remedy every risk or fear attendant to living and working in a potentially hazardous world; that a tort plaintiff must suffer present physical impairment for there to be a compensable injury.

IV. Medical monitoring should be an item of damages available only to those persons who have a compensable tort injury. The better reasoned decisions in this area are based on the principle that only in the context of a discernible physical impairment can a court deal meaningfully with the concept of future medical expenses. Medical monitoring is very expensive and, if made available to people who are not impaired, would divert resources away from compensating those plaintiffs who *are* impaired.

V. The record in this case does not support Mr. Buckley's claim for the cost of medical monitoring. The theory of relative risk underlying the claim—that any exposure to asbestos, no matter how slight, creates "significant" risk of disease—is both scientifically and logically flawed. Mr. Buckley's smoking habit and other occupational exposures and disease risks were virtually ignored by Respondent's experts pursuant to the theory that a distinct medical monitoring program for asbestos disease could be fashioned independent of the complex array of health care services a person would otherwise require throughout his or her life. There was no proof offered to support that theory, or to establish that such monitoring would provide reliable results or would somehow change the course of admittedly untreatable diseases.

Moreover, the U.S. Preventive Services Task Force found that a "routine chest x-day to screen for lung cancer"—the exact relief Mr. Buckley seeks—is "ineffective." Even Mr. Buckley's expert at trial admitted that no study shows that routine x-rays have any benefit for individuals who, like Mr. Buckley, have both asbestos exposure and a history of smoking cigarettes. Medical monitoring, if

ever appropriate, should be an item of damages only where the monitoring is shown to be medically appropriate and beneficial.

ARGUMENT

I. THE ASBESTOS LITIGATION IS UNMANAGEABLE ONLY WHEN PERSONS WHO ARE NOT PHYSICALLY IMPAIRED ARE NONETHELESS ALLOWED TO MAINTAIN LAWSUITS

As this Court enters for the first time the thicket of asbestos-related personal injury litigation, it must be prepared to separate the facts from the hyperbole surrounding this area of law. Perhaps the most persistent misunderstanding involves the notion that all asbestos-related claims are alike and that the judicial machinery of this nation is grinding to a halt because of the claims of people who are dead or dying as a result of asbestos exposure. While it is true that a tragic number of people have contracted fatal or disabling asbestos-related diseases, their claims represent a relatively small and shrinking proportion of pending claims nationwide.

Asbestos litigation dockets are increasingly dominated by the claims of people, like Mr. Buckley, who are not sick. Until now, asymptomatic plaintiffs would at least point to the presence of non-dysfunctional "pleural plaques" as the basis for their claim. Pleural plaques, also known as pleural thickening, pleural scarring and pleural fibrosis, are the most common of the bodily changes at issue in unimpaired cases. The pleural membrane is a thin tissue covering the lungs and lining the thorax that separates the lungs from the rib cage and diaphragm. This membrane secretes a moistening liquid that allows the lungs to expand during respiration without rubbing against the chest wall. Pleural plaques are a benign change to the pleurae and are generally not in any way disabling or symptomatic. *See In re Asbestos Products Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL

539589, *2 n.8 (E.D. Pa. Sept. 16, 1996); *In re Asbestos Litig. (Mancari and Gajewski)*, No. 347, 1995 Del. LEXIS 323, *1 (Del. Sept. 5, 1995); *Caterinicchio v. Pittsburgh Corning Corp.*, 605 A.2d 1092, 1095 (N.J. 1992) (citing R. Doll & J. Peto, Effects on Health of Exposure to Asbestos 2 (1985)).

When pleural thickening is asymptomatic ("benign"), "individuals are able to lead active, normal lives, with no pain or suffering, no loss of an organ function, and no disfigurement due to scarring." *Simmons*, 674 A.2d 232, 236 (Pa. 1996) (citing *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Hawaii 1990)). Indeed, individuals with asymptomatic pleural thickening cannot feel it; they do not know that they have it; and it is undetectable without the use of an x-ray.

Even with the long latency periods associated with asbestos disease, the claims of death or serious illness arising from occupational exposures from the 1930's through the 1960's have largely been brought and resolved over the last decade. They have now been replaced by even larger numbers of "pleural plaque" claims. It is widely felt that the sheer volume of claims involving this non-impairing condition created a "crisis" in docket control that led to the establishment of MDL 875. *See Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* 22, 26-27 (March 1991).

The proliferation of such "pleural plaque" claims is not surprising, given the financial incentives for both plaintiffs and their lawyers. Despite the absence of present impairment, the plaintiffs invoke the specter of other disabling or fatal asbestos-related diseases that may yet be contracted. The potential of recovering a large award to cover the risk or fear of future disabling injuries is sufficient to cause thousands of unimpaired plaintiffs to pursue tort claims, particularly since contingency fee arrangements have made participation in this asbestos litigation "lottery" virtually free. As the transactions costs are ef-

fectively transferred to plaintiffs' counsel, the only convenient hedge that the lawyers have against the risk of non-recovery is volume. A large award of "risk" or "fear" damages in a single non-impairment case would subsidize the cost of seeking such awards in all such cases, so the low probability of winning the lottery can be offset by playing often.

Experience in a growing number of jurisdictions has shown, however, that the huge flood of claims by plaintiffs who are unimpaired can effectively be stemmed through a variety of means. As will be discussed more fully below (*see* pp. 17-20, *infra*), most courts that have confronted the issue have concluded—as Owens-Illinois submits this Court should—that claims by plaintiffs who are not ill must be dismissed. *See, e.g., Simmons*, 674 A.2d at 23 ; *In re Hawaii Federal Asbestos Cases*, 734 F. Supp. at 1567-69; *Burns v. Jaquays Mining Corp.*, 752 P.2d 28, 31 (Ariz. 1987), *review dismissed*, 781 P.2d 1373 (1989); *Wright v. Eagle-Picher Indus.*, 565 A.2d 377, 380-81 (Md. App. 1989); *Schweitzer v. Consolidated Rail Corp.*, 758 F.2d 936, 942 (3d Cir.), *cert. denied*, 474 U.S. 864 (1985). Other courts have placed such unimpaired claims on inactive dockets until such time (if ever) that an asbestos-related illness develops. *See, e.g., In re Asbestos II Consol. Pretrial*, 142 F.R.D. 152 (N.D. Ill. 1991); *In re Asbestos Cases (Mulligan)*, 586 N.E.2d 521, 523 n.4 (Ill. App. 1991) (noting existence of such inactive dockets in numerous other jurisdictions); *Burns v. Celotex Corp.*, 587 N.E.2d 1092 (Ill. App.), *appeal denied*, 596 N.E.2d 626 (Ill. 1992).

Perhaps the most innovative, fair and practical responses to the challenges of asbestos-related litigation have come from Judge Charles Weiner in the context of MDL 875, the multidistrict litigation that has, since 1991, encompassed all asbestos-related claims pending in the federal courts. Judge Weiner has overseen resolution of more than 40,000 of the almost 59,000 asbestos-related cases that

have been brought before him. *In re Asbestos Products Liab. Litig. (No. VI)*, No. MDL 875, 1996 WL 239863, *1 (E.D. Pa. May 2, 1996). When faced with more than 18,000 maritime cases from claimants who, according to the materials produced by the plaintiffs' counsel, were not ill, Judge Weiner "administratively dismissed" those cases without prejudice and with all statutes of limitation tolled. *Id.* at *4. Judge Weiner's answer to the problem of unimpaired claims, which explicitly preserves the right of the plaintiffs to "maintain an action should their circumstances warrant the furtherance of their case," *id.*, is precisely the type of resolution calibrated to retain fairness and balance in the asbestos-related litigation.

Mr. Buckley's case, of course, represents a new and even more extreme version of the non-impairment claim: as discussed below, he does not even have pleural plaques. Mr. Buckley's only purported tort injury is the mere fact of exposure to a potentially harmful substance.

This case therefore squarely presents the question whether asbestos-related personal injury litigation should be restricted to plaintiffs who at least claim to be presently impaired, or whether it should be thrown open to plaintiffs who admittedly are functionally normal. Many lower courts have taken responsible steps to restrict the litigation to those who can show present physical impairment, and that answer to the problem is equally applicable here. This Court should be careful not to undue the work of Judge Weiner and his colleagues in the federal and state judiciaries who have found ways to avert a real asbestos crisis.

II. MR. BUCKLEY'S EXPOSURE TO ASBESTOS WILL NOT AUTOMATICALLY—OR EVEN PROBABLY—LEAD TO ILLNESS

A. Mr. Buckley Is Not Presently Impaired

It is undisputed that Mr. Buckley is not sick or in any way impaired by his exposure to asbestos. His Amended

Complaint admits that fact: "[T]he plaintiff is *not* bringing a cause of action or claiming damages for the actual clinically diagnosed condition of asbestosis, lung cancer, or other asbestos-related disease or illness." (J.A. 17) (emphasis added).

His own expert witness, Dr. Markowitz, testified that Mr. Buckley's breathing and chest x-rays are both "normal" (J.A. 73-74) and that Mr. Buckley exhibits "absolutely no [evidence of] asbestos-related disease." (J.A. 118). Indeed, Mr. Buckley is able to walk fifteen to twenty miles per week and can climb seven flights of stairs "with no difficulty." (J.A. 173).

B. Exposure Does Not Equal Disease

Mr. Buckley's good health is hardly surprising, common misconceptions about asbestos-related disease notwithstanding. Asbestos exposure is ubiquitous in this country: "Everyone in any urban environment has some asbestos exposure." (J.A. 108). Even if one considers only occupational exposures, the plaintiff's proof was that, in just seven industries, more than 16 million individuals have asbestos exposure. (J.A. 280-81).

Asbestos exposure, however, simply is not the equivalent of asbestos disease. The body has extensive, multifaceted defense mechanisms that protect us from inhaled substances, including asbestos. (J.A. 109). Standard texts in the field conclude that these mechanisms clear from the lungs the overwhelming majority of inhaled asbestos fibers:

> Many inhaled asbestos fibers, as with dust in general, are also effectively entrapped and cleared. A study by Evans, et al. in an animal model suggested that two-thirds of the inhaled fibers were trapped in the larger airways, thus greatly limiting the potential peripheral burden. By the end of the first month, it was further observed that clearance had eliminated three-fourths of the particles that reached the distal airways.

D. Dail and S. Hammer, Pulmonary Pathology 919 (2d ed. 1994)(footnote omitted).[1] Those fibers that remain are then attacked at the cellular level by scavenger cells called macrophages. (J.A. 79).

Even Mr. Buckley's expert witnesses admit that the incidence of asbestos-related disease is dose-related. (J.A. 110). Beyond that factor lie questions of individual susceptibility, for it is undisputed that people with virtually identical exposure histories experience dramatically different results for reasons medical science cannot explain.

What medical science can and does explain, however, is that asbestos-related disease does not occur, except at certain discernible levels of exposure. *See, e.g.*, B. Mossman, J. Bignon, M. Corn, A. Seaton, J. Gee, *Asbestos: Scientific Developments and Implications for Public Policy*, Science, Jan. 1990, at 198. A standard text on occupational lung disorders states, "The threshold of exposure below which clinical evidence of asbestos would not appear has been put conservatively at 25 fibres/ml years.[2] Epidemiological evidence suggests a slightly higher exposure threshold for increased lung cancer risk." W. Parkes, Occupational Lung Disorders 482 (3d ed. 1994) (citations omitted). That same text also states, "The lowest estimated cumulative exposure on record resulting in a mesothelioma appears to be of the order of 5 fibres/ml year . . . ." *Id.* at 474.

While the plaintiff's experts did not contest much of the foregoing (e.g., "[L]ower levels of exposure are needed for

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[1] One of the authors of that text, Dr. Hammar, is commonly called by the *plaintiffs* to testify in asbestos-related personal injury trials.

[2] Exposure levels are customarily expressed in terms of the number of asbestos fibers per milliliter of air. The cumulative exposure of any individual is customarily expressed as the average exposure level experienced by the individual over the course of his/her working life, multiplied by the years of exposure. For example, an average exposure of 5 fibers/ml for 5 years would result in a cumulative exposure of 25 fibers/ml years.

mesothelioma than to produce asbestosis" (J.A. 66)), they did claim that a hypothetical *risk* of disease—as opposed to actual *incidence* of disease—occurs at any level of exposure, no matter how slight. According to Dr. Markowitz, "There is no established safe level . . . [I]f there is any exposure, there is some level of risk." (J.A. 58). Dr. Nicholson went even further, claiming that exposure to barely measurable levels of asbestos in the ambient air will result in asbestos disease, thus putting "every one of us in the United States" at risk of developing an asbestos-related disease. (J.A. 310-11). The level at which risk begins, according to Dr. Nicholson, is "any exposure to asbestos whatsoever." (J.A. 336).

There are, in the eyes of the medical and scientific community, many difficulties with Dr. Nicholson's "one fiber" theory of asbestos risk. *See generally* K. Brown, *Asbestos-Related Disease and the "One Fibre" Theory*, Occupational Health Review (Oct./Nov. 1987). For present purposes, the most telling shortfall is one admitted by Dr. Nicholson himself:

> Q. You don't have any hard data to support this do you?
>
> A. Other than the linearity of data at higher exposures, . . . a specific experiment to validate effect, to identify effects for low exposure, is not feasible.
>
> * * * * *
>
> Q. you would agree that there is [sic] no data currently available that actually reports the incidence of asbestos-related cancers beyond that expected at exposure below .025 fibres per milliliter?
>
> A. I completely agree with that.

(J.A. 336, 352).

The most that can be said, then, about the evidence before the trial court is that the plaintiff did not even suggest, much less prove, that exposure to asbestos inevitably, or even likely, results in disease. Rather, if the plaintiff's experts are to be believed (despite an admitted lack of supporting data), Mr. Buckley—like virtually every other American—has a theoretical possibility of developing an asbestos-related disease. That risk, argues the plaintiff, should be held to constitute a compensable injury.

III. ONLY PERSONS WHO ARE PHYSICALLY IMPAIRED HAVE A COMPENSABLE TORT INJURY

A. Unimpaired Plaintiffs Have No Compensable Injury

This case centers on the question, *when*, if ever, does an asbestos-exposed individual suffer a compensable tort injury? Does every person who has been exposed to asbestos have a compensable tort injury for emotional distress or fear of disease, simply because we know, to a reasonable degree of scientific certainty, that exposure to asbestos causes some kind of change to their bodies at the cellular level? If not, what sensible line can be drawn to distinguish those asbestos-exposed persons who have compensable tort injuries from those who have no such injury?

Owens-Illinois submits that the line must be drawn at physical impairment—plaintiffs who do not claim to be sick should not be allowed to recover damages. Mr. Buckley, and other unimpaired plaintiffs, would draw the line much differently, but their notions of compensable injury are so broad as to be wholly unworkable.

In this case, Mr. Buckley faced the quandary of showing that he had suffered a "physical impact" from his asbestos exposure without the benefit of any "verifiable clinical signs" of that exposure. (J.A. 641). Indeed, as demonstrated in Section II *supra*, Mr. Buckley could offer no proof of bodily change—much less physical impairment—as a result of his exposure to asbestos.

In the absence of illness or even a detectable bodily change, the Second Circuit drew the compensable injury

line based upon presumed (though unproven) cellular changes ("impact") and the theoretical risk arising from the claimant's exposure to asbestos. The court did not designate any precise quantum of exposure necessary to establish this "injury." Indeed, it turned a blind eye to the plaintiff's statistical estimates concerning risk, such as they were, and simply announced that Mr. Buckley was entitled to recover because his asbestos exposure was "massive, lengthy and tangible." (J.A. 645). The court offered no guidance as to how other courts are to determine whether exposure in other cases is sufficiently "massive, lengthy and tangible" to give rise to a cause of action.

There is, of course, no sound authority for this remarkable finding. Indeed, as argued below, it is directly contrary to a number of decisions, most notably, the Third Circuit's decision in *Schweitzer*.

Perhaps more fundamentally, there is no basis in this record to draw a distinction between "massive" exposure versus "moderate" or "limited" exposure. The fact is that plaintiff's experts could not accurately quantify Mr. Buckley's exposure because no dust counts were taken while he was working with asbestos-containing materials. Rather, Dr. Markowitz was content merely to characterize the exposure. Interestingly, he did not use any of the adjectives used by the Second Circuit; instead, he said only that Mr. Buckley had "quite a bit of exposure." (J.A. 181). It was, he opined, "roughly equivalent to the kind of . . . exposure that some shipyard workers have." (J.A. 189).

Dr. Nicholson was unable to do much better. "I estimated that Mr. Buckley's one-hour exposure was similar to the insulators in the early years, in the 50's and 60's and 70's." (J.A. 238). The problem, he said, was that insulators did not ordinarily remove asbestos-containing insulation, they applied it; Mr. Buckley did not apply insulation, he removed it (in order to do pipefitting work).

(J.A. 236-38, 255). Dr. Nicholson admitted that these activities involved different exposure conditions over different lengths of time, so he made up a ratio, declaring one hour of Mr. Buckley's asbestos removal work equivalent to eight hours of insulators' asbestos application work. (J.A. 236-38). He then made an adjustment based upon the supposed "fact" that all insulators worked for twenty-five years under constant exposure conditions, while Mr. Buckley's alleged exposure lasted less than three years. *Id.*

Dr. Nicholson was not yet finished. He opined that 30% of all insulators die of cancer. (J.A. 243). He apparently assumed that all of those cancers were caused by asbestos, for he extrapolated Mr. Buckley's *asbestos*-related cancer risk to be 3/25ths (the supposed exposure ratio of Mr. Buckley to all insulators) of 30%, or 2.3%. (J.A. 243-44). Admitting some "uncertainty" in his calculation, he expanded the range of increased cancer risk to "1 percent to 5 percent." (J.A. 244).

No legal standard based upon this form of statistical sleight-of-hand can bear rational scrutiny or be applied fairly in the myriad factual circumstances of the thousands of "exposure only" claims that are sure to follow. Dr. Nicholson's exposure "estimate" flies in the face of the dust counts actually taken in Grand Central Station during the relevant period (albeit not specifically during Mr. Buckley's alleged exposure)—all of which were at or below .01 fibres/ml (less than 1/10,000th of Dr. Nicholson's high-end estimates for removal work). (J.A. 334). Dr. Nicholson's own published exposure levels for insulators were only 3 fibres/ml, a fraction of the level he assumed in his "estimate." (J.A. 324-25).

The Second Circuit's resort to mere adjectives to establish the line between compensable tort injury and no cause of action—"massive, lengthy and tangible" exposure—is understandable in the face of Dr. Nicholson's "estimate." It remains, however, no standard at all.

B. The Line For Compensable Tort Injury Should Be Drawn At Physical Impairment

Mr. Buckley seeks to divorce pain, disfigurement, or loss of function from the test for compensable injury, thereby eliminating from this area of tort law any notion of functional injury. Under this view, which the Second Circuit adopted below, individuals are entitled to compensation not because they cannot breathe, work, play or live normally, but rather because there is evidence of non-impairing asbestos-related exposure and presumed cellular changes that the individual otherwise had no reason to know existed.

If functional impairment is to be abandoned as the essence of tort injury, why draw the line at "massive" exposure"? Why exclude "moderate" exposure? The honest answer is that, once the requirement of functional impairment is lost, there is, according to Dr. Nicholson, no subset of an asbestos-exposed population that lacks a colorable claim of "injury."

As medical technology advances, so does our capacity to detect the body's cellular (or even sub-cellular) reaction to exposures, infections or traumatic events. Medical science can now demonstrate that the human body reacts to inhaled asbestos (and any number of other inhaled substances) almost immediately. *See, e.g., J.H. France Refractories Co. v. Allstate Ins. Co.*, 626 A.2d 502, 505-06 (Pa. 1993). These advances, while stretching our scientific horizons, also threaten to stretch beyond recognition the boundaries of our tort law. A physiological change is not compensable simply because it is detectable. To allow recovery of compensatory damages for presumed cellular changes or risks of future disease, in the absence of present functional impairment, would open almost infinite areas of tort liability.

The costs of such a rule would be enormous. While unimpaired plaintiffs have no lost earnings and have experienced no physical pain, cases like this one demonstrate that each would allege emotional distress caused

by fear of an impairing asbestos-related illness that he or she does *not* have. The asbestos litigation "lottery" would thus be expanded, and the transactions costs of litigating the speculative claims of non-impaired plaintiffs would be staggering.

As a growing number of jurisdictions have come to recognize, the line of demarcation simply must be drawn at functional impairment. Although even that cannot provide a perfectly administrable standard, malignancies are easily detectable and other types of functional impairments are objectively discernible by pulmonary function testing. *See, e.g., In re Asbestos II Consol. Pretrial*, 142 F.R.D. at 156-57.

Among the most influential decisions in this area is *In re Hawaii Federal Asbestos Cases*. That court found:

> Plaintiffs must show a compensable harm by adducing testimony of a *functional impairment* due to asbestos exposure. A claimant's subjective testimony as to shortness of breath and fatigue without more is not sufficient. In other words, the mere presence of asbestos fibers, pleural thickening or pleural plaques in the lung unaccompanied by an objectively verifiable functional impairment is not enough.

734 F. Supp. at 1567 (emphasis in the original).

The Maryland Court of Special Appeals also found that asymptomatic pleural thickening is not a legally compensable injury. *Owens-Illinois, Inc. v. Armstrong*, 591 A.2d 544, 561 (Md. App.), *rev'd on other grounds*, 604 A.2d 47 (Md. 1991), *cert. denied*, 506 U.S. 871 (1992). That court pointed to Section 7 of the Restatement (Second) of Torts (1965), noting that it identifies "harm" as a necessary element in a cause of action for negligence and strict liability. Comment b to Section 7 further explains that: " '[h]arm' implies a loss or detriment to a person, and not a mere change or alteration in some physical person . . . In so far as physical changes

have a detrimental effect on a person, that person suffers harm.' " *Id.* Moreover, as other courts and commenators have noted, " '[t]he threat of future harm, not yet realized, is not enough.' " *Jaquays*, 752 P.2d at 30 (quoting Prosser and Keeton on the Law of Torts § 30 at 165 (5th ed. 1984)).

Another major decision on this subject was the Pennsylvania Supreme Court's recent ruling in *Simmons v. Pacor, Inc.* That court denied recovery for asymptomatic pleural thickening, holding that illness is required for recovery in asbestos-related litigation, including claims for emotional distress damages. 674 A.2d 237-38. The Third Circuit issued a landmark statement on this issue in *Schweitzer:*

> It is true that the possible existence of subclinical asbestos-related injury prior to manifestation may be of interest to a histologist. [citations omitted] Likewise, the existence of such injury may be of vital concern to insurers . . . . We believe, however, that subclinical injury resulting from exposure to asbestos is insufficient to constitute the actual loss or damage to a plaintiff's interest required to sustain a cause of action under generally applicable principles of tort law . . . . *Requiring manifest injury as a necessary element of an asbestos-related tort action . . . best serves the underlying purpose of tort law: the compensation of victims who have suffered.*

Schweitzer, 758 F.2d at 942 (emphasis added); *see also Caterinicchio*, 605 A.2d at 1096 (finding no reported decision holding that pleural thickening constitutes a compensable injury); *Herber v. Johns-Manville Corp.*, 785 F.2d 79, 89 (3d Cir. 1986) (district court properly excluded evidence of increased risk of future cancer where plaintiff had pleural thickening but could not establish that he would be more likely than not to experience cancer in the future); *Jaquays*, 752 P.2d at 31 (finding "no reason to depart from traditional tort concepts and allow recovery for injuries before any disease becomes manifest"); *Pollock v. Johns-Manville Sales Corp.*, 686 F. Supp. 489, 491-92 (D.N.J. 1988) (plaintiff with pleural thickening could not litigate the issue of increased risk of cancer because he could not show the risk was more probable than not).

As the *Schweitzer* court indicated, the underlying purpose of tort law is to provide compensation to people with actual damages. Failure to require impairment for recovery would seriously undermine that goal. It is widely recognized that asbestos litigation transaction costs are potentially overwhelming. The Judicial Conference Ad Hoc Committee termed those transaction costs "unconscionable." *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* at 13. The system cannot afford to allocate scarce judicial and party resources to the adjudication of a virtually endless stream of claims brought by asbestos-exposed individuals who are not ill as a result of that exposure.

As courts have noted, to rule otherwise would inevitably result in a gross misallocation of compensatory damages. *See, e.g., Marinari v. Asbestos Corp.*, 612 A.2d 1021, 1026-27 (Pa. Super. 1992). Those who never actually develop asbestos-related illnesses would be overcompensated, having been paid for fears that proved to be unfounded. Those who did develop asbestos-related illnesses would likely be undercompensated, due to a probability-based discounting by the jury.

Requiring the actual occurrence of asbestos-related illness in order to bring suit, and then awarding damages for all past, present and future pain and suffering related to that illness, ensures that adequate compensatory damages are channeled to those who are most entitled to them. The filing of new claims will continue to be subject to a rational filter. Those that are filed can be resolved based upon concrete proof of illness, not dubious statistical projections of hypothetical risks.

Will reversing the Second Circuit's decision serve as a panacea for the asbestos litigation problem confronting the nation's courts? No, there is no simple, comprehensive answer that any court or party has yet devised to this seemingly intractable problem.

A strong statement from this Court rejecting claims by unimpaired plaintiffs will, however, make a bad situation materially better. Such a statement will help ensure that lower courts and the parties will be able to concentrate scarce resources on claims of actual illness and that progress in reducing the backlog of such claims will not simply be erased by the next wave of unimpaired claims.

IV. THE COSTS OF MEDICAL MONITORING SHOULD BE LIMITED TO PERSONS WITH A COMPENSABLE TORT INJURY

If this Court finds that plaintiffs who are not ill from exposure to asbestos have no compensable tort injury, it should also find that such claimants cannot recover for the costs of a lifetime of medical monitoring. The Second Circuit's decision to allow Mr. Buckley to recover on his claim for medical monitoring is a departure from the traditional and sound legal principle that there can be no cause of action for damages in tort without the presence of actual physical injury at the time of the suit.

Although the lower courts are divided as to whether unimpaired plaintiffs can recover for medical monitoring,[3]

[3] Some courts, including the Second Circuit below, have held that proof of mere exposure to a harmful substance is sufficient to recover medical monitoring costs. (J.A. 649) (allowing recovery for medical monitoring "despite the fact that [Buckley] has yet to suffer an asbestos-related disease"); *see also Jaquays*, 752 P.2d at 33-34 (allowing recovery for medical monitoring despite rejecting other compensatory damages claims); *Meyerhoff v. Turner Const. Co.*, 534 N.W.2d 204, 206 (Mich. App. 1995) (allowing medical monitoring costs for exposure to asbestos absent present injury), *appeal denied*, 550 N.W.2d 535 (Mich. 1996); *Redland Soccer Club v. United States Dep't of the Army*, 55 F.3d 827, 845-48 (3d Cir. 1995) (allowing recovery for medical monitoring claim despite lack of present injury where plaintiff can prove "significant exposure"), *cert. denied*, 116 S. Ct. 772 (1996); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 980 (Utah 1993) (allowing recovery for medical monitoring despite lack of injury where plaintiff can show that a reasonable physician would prescribe a different monitoring regime than if not exposed). The Pennsylvania Supreme Court in *Simmons* suggested that medical monitoring should be available to individuals with occupational exposure to asbestos *and* non-dysfunctional pleural plaques. 674 A.2d at 239.

Other courts have required the plaintiff to prove that an injury is "reasonably certain to occur" as a result of toxic exposure or that there is a "reasonable medical probability" of it occurring. *E.g., Hagerty v. L & L Marine Services, Inc.*, 788 F.2d 315, 319 (5th Cir. 1986); *Mauro v. Raymark Industries, Inc.*, 561 A.2d 257, 266 (N.J. 1989); *Potter v. Firestone Tire and Rubber Co.*, 863 P.2d 795, 821-23 (Cal. 1993).

the better-reasoned decisions have barred such claims based on a compensable injury requirement. For example, the Fourth Circuit, in rejecting medical monitoring damages in a toxic exposure case, found that "[a] claim for medical surveillance costs is simply a claim for future damages . . . such relief only is available where a plaintiff has sustained a physical injury that was proximately caused by the defendant." *Ball v. Joy Technologies, Inc.*, 958 F.2d 36, 39 (4th Cir. 1991), *cert. denied*, 503 U.S. 1033 (1992). *See also Thomas v. FAG Bearings Corp., Inc.*, 846 F. Supp. 1400, 1410 (W.D. Mo. 1994) ("[e]ntitlement to the costs of future medical monitoring requires plaintiff to prove actual present injury and an increased risk of future harm"); *Werlein v. United States*, 746 F. Supp. 887, 904 (D. Minn. 1990) (permitting medical monitoring only where "a given plaintiff can prove that he has present injuries"); *Catasauqua Area School Dist. v. Eagle-Picher Indus., Inc.*, No. 85-3743, 1988 WL 102689 at *1 (E.D. Pa. Sept. 28, 1988) (mere exposure to asbestos is not an injury that supports medical monitoring); *Purjet*

v. Hess Oil Virgin Islands Corp., No. 1985/284, 1986 WL 1200, at *4 (D.V.I. Jan. 8, 1986) (medical monitoring only appropriate where there is an actual injury); *Meganthaler v. Asbestos Corp.*, 480 A.2d 647, 651 (Del. 1984) (summary judgment in favor of defendant where plaintiff alleged no present injury); *Hayes v. AC&S, Inc.*, No. 95-CH-1835, at 13-14 (Cook County, Ill. Oct. 30, 1996) (rejecting claim for medical monitoring for exposure without manifest symptoms).

These decisions flow from the principle that only in the context of a discernible physical impairment can the courts deal meaningfully with the concept of future medical expenses. The physical impairment requirement moors the inquiry to a specific condition and course of treatment. While consideration of future medical expenses is perhaps inherently speculative, the courts have properly reasoned that the present impairment requirement provides the necessary boundaries to ensure rational results.

The Second Circuit ignored those boundaries, choosing instead to link medical monitoring to subjective characterizations of exposure provided by the plaintiff himself, augmented by an "estimate" of exposure (and consequent risk) worthy of Rube Goldberg. That rule has no meaningful limiting principles and should be rejected by this Court.

There is an inaccurate perception that medical monitoring is a relatively inexpensive means for providing compensation to individuals who have been exposed to a toxic substance; in fact, the costs for medical monitoring in toxic tort cases can be "staggering." E. Wiechmann, *Curse of the Unsick: Update on Latent Injury Claims in Toxic Tort Cases*, 25 Brief 10, *44 (Summer 1996). In the seminal medical monitoring decision by the New Jersey Supreme Court, the total compensatory damages awarded at the trial level were $24,058,892, with more than one-third ($8,204,500) attributable to medical monitoring costs. *Ayers v. Township of Jackson*, 525 A.2d 287, 291 (N.J. 1987).

Permitting damages for medical monitoring where there is no evidence of an actual asbestos-related illness could divert untold millions of dollars away from compensation to the injured and toward costly medical tests—or straight cash awards—for the uninjured. The result would be a windfall for healthy plaintiffs who never manifest injury and insufficient compensation for those who are sick now or become sick later.

Perhaps the most significant question raised by Mr. Buckley's bid for medical monitoring damages is where this type of compensation would stop. If Mr. Buckley is able to recover money for his future medical care based solely on his exposure to asbestos, could he then recover further medical surveillance costs for his alleged exposure to other toxic substances?

The Amended Complaint alleged that Mr. Buckley "has and will in the future incur medical expenses for the testing and monitoring of his medical condition related to his exposure to harmful amounts of hazardous materials, including *but not limited to asbestos*." (J.A. 17) (emphasis added). As one set of commentators has pointed out, with an estimated thirty-eight percent of all cancers attributable to occupational exposure to toxic chemicals and 50,000 hazardous waste sites in the United States, "in the very near future we may all have reasonable grounds to allege that some negligent business exposed us to hazardous substances and to get medical experts to testify that the exposure significantly increased our risk of disease . . . ." S. Martin & J. Martin, *Tort Actions for Medical Monitoring: Warranted or Wasteful?*, 20 Colum. J. Envtl. L. 121, 130 (1995). To follow the Second Circuit's view of when medical monitoring costs should be awarded would be to fill the courts with cases of dubious merit and to allow an ever-increasing per-

centage of damages awards to go to litigation expenses instead of for truly compensatory purposes.

V. MEDICAL MONITORING IS NOT JUSTIFIED ON THIS RECORD

Bad factual records make bad law, as this case threatens to prove. The plaintiff's proof was not that "massive, lengthy and tangible" exposure to asbestos creates the type of disease risk that justifies medical monitoring. Rather, it was that virtually *any* exposure to asbestos—even exposure *below* the OSHA standard of .1 fiber/ml—creates "a significant risk" of disease. (J.A. 356).

It mattered not to the plaintiff's experts, for example, that the absolute risk of lung cancer from asbestos exposure among a population of insulators (not pipefitters) is, according to their selected authorities, only 55 per 100,000 of population per year—a risk of approximately 1/20th of 1%. *Dafler v. Raymark Indus. Inc.*, 611 A.2d 136, 140 (N.J. Super. 1992), *aff'd*, 622 A.2d 1305 (N.J. 1993). It was enough that asbestos exposure purportedly increases the *relative* risk of lung cancer five times over background. (J.A. 62).[4]

It also mattered not to the plaintiff's experts that Mr. Buckley smoked approximately a pack of cigarettes per day for twenty years, because he had recently cut back to one cigarette per day. According to Dr. Markowitz, Mr. Buckley had only "some risk" of smoking-related cancer, a risk that supposedly was less than three to five times that of a non-smoker. (J.A. 163). According to Dr. Nicholson, eighty to ninety percent of that excess

[4] Even this five-fold relative increase is based on a single study published seventeen years ago and premises the increased risk on four lung cancer deaths in insulation workers. (J.A. 150-57). Moreover, these were insulation workers who, although they may have smoked cigarettes, in the estimation of the researchers they "never smoked regularly." (J.A. 156).

smoking risk would disappear within ten years of quitting the smoking habit. (J.A. 250-51).

Even a cursory review of the Surgeon General's most recent data on smoking-related cancer risks shows that the Second Circuit was palpably misled. Current male smokers who smoke 1 to 20 cigarettes per day have 18.8 times the lung cancer risk of non-smokers. D. Shopland, H. Eyre, T. Pechacek, *Smoking Attributable Mortality in 1991: Is Lung Cancer Now the Leading Cause of Death Among Smokers in the United States?*, J. of the Nat'l Cancer Inst. 83, 1143 (Aug 21, 1991) (quoting data from Centers for Disease Control, Public Health Consequences of Smoking—25 Years of Progress. A Report of the Surgeon General, 1989, DHHS Publ. No. (CDC) 89-8411 (1989)).

During the first year of quitting smoking, that lung cancer risk actually goes *up* to 26.7 times background. *Id.* Ten years after quitting, the risk is still 8.7 times background. *Id.*

The point here is that Mr. Buckley has a dramatically increased risk of lung cancer due solely to his smoking habit. As one author has noted, of the hundreds of thousands of lung cancers occurring in this country annually, "85 to 90% . . . are attributable to cigarette smoking, whereas as few as 2% of cases may be related to asbestos exposure." V. Roggli, *Human Disease Consequences of Fiber Exposures: A Review of Human Lung Pathology and Fiber Burden Data*, 84 Envtl. Health Perspective 301 (1990) (citation omitted).

It is one thing to suggest that asbestos defendants provide the functional equivalent of HMO services to individuals with diagnosed, impairing asbestos-related diseases. In the face of such confounding hazardous exposure, to suggest that they do so where no such present injury from asbestos exposure exists is uprecedeted and unfair.

The problems with Mr. Buckley's medical monitoring claim, and the Second Circuit's opinion concerning same,

do not end there. The purpose of medical monitoring is supposed to be to improve the plaintiff's prognosis through early detection of disease. The record here, however, is that monitoring will confer no meaningful benefit because the asbestos-related diseases about which Mr. Buckley claims to be concerned are untreatable: "Lung cancer is still largely an incurrable disease." (J.A. 60). As for mesothelioma, "There is no successful treatment in the sense of a cure." (J.A. 56). Unfortunately, the same is also true for asbestosis: "[T]here is nothing we can do about it." (J.A. 65).

The Second Circuit took no account of the fact that, when medical monitoring is viewed not as a litigation construct, but rather as a scientific discipline, important governing principles emerge. According to the U.S. Preventive Services Task Force, monitoring procedures can only be justified where they have proven effectiveness, they produce neither false positives nor false negatives at unacceptable levels, they "avoid[] harm to asymptomatic patients," and they have been shown that "they improve clinical outcome." U.S. Preventive Services Task Force. Guide to Clinical Preventive Services xxxi (2d ed. Williams & Wilkins 1996).

Applying these principles, the Task Force specifically found that a "routine chest x-ray to screen for lung cancer"—the very relief sought here—is "ineffective." *Id.* The Task Force is not alone in reaching this conclusion:

> Because of the available evidence, virtually all organizations concur that screening for lung cancer is not justified. For example, the American Cancer Society, the American College of Radiology, the National Cancer Institute, the U.S. Preventive Services Task Force, and the Canadian Task Force on the Periodic Health Examination all decline to recommend lung screening with any test at any frequency.

D. Eddy, Common Screening Tests 322 (Am. College of Physicians 1991) (citations omitted). Even Dr. Markowitz admits that no study has been conducted to support the alleged utility of chest x-rays for indivduals with a combination of asbestos exposure and a history of cigarette smoking. (J.A. 164).[8]

Owens-Illinois respectfully submits that recharting the course of asbestos-related litigation to encompass medical monitoring for all asbestos-exposed individuals who can find an expert witness to declare their "estimated" exposure to be "significant" is both unwise and unnecessary. No scientific principles articulated in this record justify such a step. No material benefit to plaintiffs has been shown. The transactions costs of litigating the medical monitoring rights of all exposed persons would threaten to overwhelm both the judicial resources of the civil justice system and the financial resources of that subset of asbestos defendants who have thus far avoided bankruptcy.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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[8] As noted *supra*, Dr. Nicholson takes the extreme position that *any* exposure to a carcinogen will produce cancer; he also believes that this "no safe level" analysis applies equally to radiation. (J.A. 261). The logical implication of those views is that annual chest x-rays as part of a medical monitoring regime would actually generate cancers.